NIKODEMUS SINGGAI & ORS v. SIBU SLIPWAY SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
LEE HENG CHEONG J
[SUIT NO: 22-208-07-I]
12 OCTOBER 2015

NATIVE LAW AND CUSTOM: *Land dispute – Native customary rights – Whether plaintiffs 'natives' within meaning of 'native customary rights' – Whether plaintiffs carried out customary practices in area claimed – Whether there was continuous occupation of lands – Whether recognition of plaintiffs' native customary rights founded both on common law principles and relevant statutes of Sarawak – Land Code (Sarawak) (Cap 81), s. 2*

WORDS & PHRASES: *'lawfully been created' – Land Code (Sarawak) (Cap 81), s. 2 – Meaning of – Creation of native customary rights – Whether in accordance with law*

This suit was commenced by the plaintiffs, as claimants of native customary rights, seeking, *inter alia*, the following orders (i) a declaration that the plaintiffs had acquired native customary rights ('NCR') over the NCR land in the map marked 'M' attached to the statement of claim therein. The plaintiffs claimed that they were Ibans residing at Kampung Spaoh, Kampung Menat Ulu and Kampung Menat Ili in Sarawak. The plaintiffs also claimed that the alleged NCR land purportedly belonging to them comprised of 'temuda', old longhouse site or 'tembawai', burial ground, cultivated fruit orchards or gardens which they inherited from Jinggan Anak Empati and Patan (Apai Chupak), his relatives and followers who came to settle on the said land long before the White Rajah came to Sarawak in accordance with the adat or customs of the Ibans of Sarawak and/or in accordance with the laws of Sarawak, and alternatively by virtue of rights recognised under common law. The fourth, fifth and sixth defendants contended that the plaintiffs had not created or acquired any native customary rights over the alleged NCR land, which consists of 'temuda' 'tembawai' and 'pulau'. The fourth, fifth and sixth defendants further contended that native customary rights could not be acquired or established after 1 January 1958 save as the creation of establishment in accordance with the provisions of s. 5(1) and (2) of the Sarawak Land Code (Cap 81) ('Land Code'), and prior to the said date, in accordance with the laws applicable to the creation of such rights immediately before the said date. The fourth, fifth and sixth defendants also contended that the alleged NCR lands which falls within an area issued with forest timber licence No OT/8393, the provisional leases of Lots 886 and 887 Samarahan Land District, Lot 1230 Sedilu Gedong Land District and

Lot 1509 Bukar-Sadong Land District were within the Ensengei Forest Reserve constituted under Gazette Notification No 1833, and that there was no infringement of the plaintiffs' rights. The issues that arose were (i) whether the plaintiffs had lawfully acquired native customary rights (as recognised by the laws of Sarawak *ie*, Sarawak Land Code (Cap 81) and legislations that preceded the said Land Code and Iban Custom) over the area claimed herein; (ii) whether an order that the sixth defendant do recognise the plaintiffs' customary rights and/or to enter and/or record the same in their registry and to issue the plaintiffs a document of title for the land, could be obtained by way of declaratory relief.

Held (granting judgment against fourth, fifth and sixth defendants):

(1) The plaintiffs, who were residents of Kampung Spaoh, Kampung Menat/Benat Ulu and Kampung Menat/Benat Ili, Gedong, Simunjan, Sarawak had given evidence that they were of the Iban race and this was not challenged. The plaintiffs were 'natives' within the meaning of 'native customary rights'. Evidences had been adduced by the plaintiffs, to show that there were evidences of inheritances from grandmothers to daughters, then from mothers to sons and some of the evidence adduced traced the inheritances from their great-grand ancestors and grand-ancestors. Further, the customary practices on the land claimed by the plaintiffs were carried out by the plaintiffs and their ancestors individually and as a composite of the village communities of the said Kampung Spaoh, Kampung Benat/Menat Ulu and Kampung Benat/Menat Ili. The origins of 'adat' or customary practices such as that of the plaintiffs had also been noted by a foreign historian, AF Porter, as having been in existence at the time of Rajah James Brooke's arrival in Sarawak in the 19th century. (paras 17, 19, 23, 24 & 25)

(2) The plaintiffs had adduced expert evidence on Iban customs and traditions of land through PW2 whose expertise was derived from his former office as the former Deputy President of the Majlis Adat Istiadat Sarawak. His testimony was consistent with the definition of 'pemakai menoa' as classified by the case of *Nor Anak Nyawai*. Within the 'pemakai menoa', there were other sub-categories of land within it which were (i) tanah umai; (ii) temuda; (iii) tembawai and (iv) pulau galau. This court thus found that the plaintiffs had carried out their customary practices in the area claimed. Further, from the evidence adduced by the plaintiffs, there was continuous occupation of the lands claimed by the plaintiffs. (paras 33, 34, 35 & 39)

(3) The critical words in s. 2 of the Sarawak Land Code are 'lawfully been created'. Thus, Native Customary Land is land over which native customary rights, whether communal or otherwise, had lawfully been created prior to 1 January 1958, and still subsist as such. The words

'lawfully been created' must necessarily mean created in accordance with the law. The recognition of the plaintiffs' NCR was founded both on common law principles and on the relevant statutes of Sarawak. (paras 44, 45 & 48)

(4) In the disputed area claimed by the plaintiffs, there were three different types of primary forest *viz* riverine forest, lowland evergreen tropical rainforest and dense kerangas forest. The cultivation mosaic as agreed by both the experts for the plaintiffs and the defendants, meant that there was a farming community in existence in the area at the time when exh. D1 was made. It was also agreed that the area of interest was predominantly covered by primary forest. Thus, it was generally accepted that human activity could not have been carried out in the area identified as primary forest. As such, this court found that the remaining areas in the area of interest, should be NCR land, consisting of approximately 300 hectares of cultivation mosaic as found in identical regions by both plaintiffs and defendants. (paras 78, 80, 81 & 82)

(5) The location of the first defendant's logging permit which was issued by the fifth defendant after the said forest reserve was deconstituted could be found in exh. D24. The land area comprising OT/8393 was generally the Ensengei Forest Reserve. Exhibit 4 showed that there were three cultivation mosaics at the centre of the area of interest. Forest Type Map 'B' of the Ensengei Forest Reserve showed the existence of temuda and rubber gardens within the area of the forest reserve. In light of the above findings, it was fair and reasonable to conclude that the NCR land of the plaintiffs formed part of the Ensengei Forest Reserve. (paras 95 & 96)

(6) There were customary activities practised by the inhabitants of Kampung Spaoh, even at the time of their ancestors, in the locality of Sungai Ensengei. Thus, at the time when the said forest reserve was constituted on 8 December 1961, the plaintiffs' native customary rights were already created and in existence. (para 98)

(7) The Land Code provides for the procedure as to the determination of any State land where it appears likely that rights of ownership had been acquired by native by the exercise of the customary rights. The procedure under s. 94(1) of the Land Code did not apply in the present case as the subject-matter land was not a land which had to be 'touched' by the Government or where a settlement notification had been published. The procedure of appeal to the Native Court of Appeal did not arise at all on the ground that the said subsection in the Code had not come into operation. In light of the court's findings herein, the plaintiffs had proved their case against the fourth, fifth and sixth defendants on a balance of probabilities. (paras 103, 108 & 109)

Case(s) referred to:

Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor [1997] 3 CLJ 885 HC ***(refd)***

Agi Bungkong & Ors v. Ladang Sawit Bintulu Sdn Bhd & Ors [2010] 1 LNS 114 HC ***(refd)***

Ara Aman & Ors v. Superintendent of Lands and Mines (2nd Div) [1973] 1 LNS 5 HC ***(refd)***

Jok Jau Evong & Ors v. Marabong Lumber Sdn Bhd & Ors [1990] 2 CLJ 625; [1990] 2 CLJ (Rep) 169 HC ***(refd)***

Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors [1998] 2 CLJ 665 CA ***(refd)***

Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA ***(refd)***

Luking Uding & Ors v. Superintendent of Lands and Surveys Kota Samarahan Division & Ors [2011] 7 CLJ 342 HC ***(refd)***

Madeli Salleh v. Superintendent of Lands & Surveys & Anor [2005] 3 CLJ 697 CA ***(refd)***

Manggai v. Government of Sarawak & Anor [1970] 1 LNS 80 FC ***(refd)***

Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors [2010] 10 CLJ 383 HC ***(refd)***

Nor Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors [2001] 2 CLJ 769 HC ***(refd)***

Numpang Suntai & Ors v. Quality Concrete Holdings Bhd & Ors [2012] 1 LNS 752 HC ***(refd)***

Professor Dr A Kahar Bador & Ors v. N Krishnan & Ors [1982] 1 LNS 103 HC ***(refd)***

Racha Urud @ Peter Racha Urud & Ors v. Ravenscourt Sdn Bhd & Ors [2012] 1 LNS 92 HC ***(refd)***

Sat Anak Akum & Anor v. Randong Anak Charareng [1957] SCR 52 ***(refd)***

Simo Sekam & Ors v. Naim Cendera Sdn Bhd & Ors [2012] 1 LNS 832 HC ***(refd)***

Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal [2005] 3 CLJ 555 CA ***(refd)***

Superintendent of Land & Surveys, Miri Division & Anor v. Madeli Salleh [2007] 6 CLJ 509 FC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3(1)(c), (3)(ii)
Federal Constitution, art. 160(2)
Land Code (Sarawak) (Cap 81), ss. 2, 5(1), (2), 6, 10, 84(3), 94(1), 95(1)
Land Settlement Ordinance (Sarawak) (Cap 28), s. 66

For the plaintiffs - See Chee How; M/s Baru Bian
- Desmond Kho; M/s Kho & Partners Advocs
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Reported by Suhainah Wahiduddin

JUDGMENT

Lee Heng Cheong J

Introduction

[1] This case was heard and tried by YA Sangau Gunting until completion and he has since retired without rendering the final decision of this case. This court took over this case and sought the views of the plaintiffs and the fourth, fifth and sixth defendants who were the remaining defendants

as to whether they have any objections to this court, rendering the decision of this case based on the notes of evidences, the exhibits adduced and the written submissions submitted. Both the plaintiffs and the fourth, fifth and sixth defendants informed that they have no objection to this court, taking over this case and delivering the judgment.

Background

[2] This suit was commenced by the plaintiffs, being the claimants of having native customary right claiming against the defendants, ie, Sibu Slipways Sdn Bhd, Lambang Sinar Mas Sdn Bhd, Indranika Jaya Sdn Bhd, Superintendent of Lands and Surveys, Samarahan Division, Director of Forest, Sarawak and Government of Sarawak. In the statement of claim filed herein, the plaintiffs seek the following orders from the court, namely:

(a) a declaration that the plaintiffs have acquired native customary rights (NCR) over the said NCR land in the map marked "M" attached to the statement of claim therein;

(b) a declaration that this native customary rights precludes the first, second and third defendants from impairing or abridging the plaintiffs' rights;

(c) a declaration that the first, second and third defendants and/or their employees, servants, agents, contractors from trespassing, entering, clearing and/or occupying the plaintiffs' said NCR land;

(d) a declaration that the issuance of the Forest Licence No. 8393 to the first defendant, the issuance of provisional leases Lot No. 1230 and Lot No. 1509 to the second defendant and subsequently provisional leases Lot No. 01229 to the third defendant as far as it covers the said land is null and void;

(e) a prohibitory injunction restraining the first, second and third defendants and/or their employees, servants, agents, contractors from trespassing, entering, clearing and/or occupying the plaintiffs' said land;

(f) an order to the sixth defendant for the recognition of such NCR and/or to enter and/or record in their registry such rights and thereafter to issue title to the said land in accordance with the provision of the Land Code (Cap 81) Sarawak;

(g) general damages against the first, second and third defendants to be assessed;

(h) interest to be charged on the said amount of damages at the rate of 8% per annum from the filing of this action date of judgment and payment as against the first, second and third defendants;

(i) and any other or relief this honourable court deems fit and justs; and

(j) cost of this action.

[3] The first, second and third defendants were struck out as parties to this case before the commencement of the trial.

[4] During the trial, the plaintiffs called 14 witnesses to prove their case. The witnesses called are Claus-Peter Gross (PW1), Nicholas Bawin Anak Anggat (PW2), Gubil Anak Padat (PW3), Mallis Anak Sujang (PW4), Laja Anak Gila (PW5), Rijau Anak S'tan (PW6), Jeram Anak Mikai (PW7), Nikodemus Anak Singgai (PW8), Jakim Anak Sadid (PW9), Entili Anak Antas (PW10), Riay Anak Belawing (PW11), Agol Anak Gila (PW12), Sanggat Anak Lasa (PW13) whereas the fourth, fifth and sixth defendants called three witnesses, namely Lim Siau Chung (DW1), Chin Chan Lee (DW2), Happysupina bin Sait (DW3) to resist the plaintiffs' claim.

The Plaintiffs' Case

[5] The plaintiffs claimed they are Ibans residing at Kampung Spaoh, Kampung Menat Ulu and Kampung Menat Ili, Jalan Gedong, Simunjan, Sarawak. The plaintiffs also claimed that their allegedly NCR land had been established by their pioneering ancestors since time immemorial even before the White Rajah came to Sarawak.

[6] The plaintiffs also claimed that the alleged NCR land purportedly belonging to them comprises of "temuda", old longhouse site or "tembawai", burial ground, cultivated fruit orchards or gardens which they inherited from Jinggan Anak Empati and Patan (Apai Chupak), his relatives and followers who came to settle on the said land long before the White Rajah came to Sarawak in accordance with the adat or customs of the Ibans of Sarawak and/or in accordance with the laws of Sarawak and alternatively by virtue of rights recognised under common law.

The Fourth, Fifth And Sixth Defendants' Case

[7] The fourth, fifth and sixth defendants contended that the plaintiffs had not created or acquired any native customary rights over the alleged NCR land, which consists of "temuda", "tembawai" and/or "pulau".

[8] The fourth, fifth and sixth defendants further contended that native customary rights cannot be acquired or established after 1 January 1958 save as the creation or establishment is in accordance with the provisions of s. 5(1) and (2) of the Sarawak Land Code (Cap 81) and prior to the said date in accordance with the laws applicable to the creation of such rights immediately before the said date.

[9] The fourth, fifth and sixth defendants also contended that the alleged NCR lands which falls within an area issued with Forest Timber Licence No. OT/8393, the provisional leases of Lots. 886 and 887 Samarahan Land District, Lot. 1230 Sedilu Gedong Land District and Lot. 1509 Bukar-

Sadong Land District are within the Ensengei Forest Reserve constituted under Gazette Notification No. 1833 dated 7 October 1964 and there is no infringement of the plaintiffs' rights.

The Pertinent Issues

[10] This court finds that the issues raised by the fourth, fifth and sixth defendants are highly pertinent in disposing off this case and they are as follows:

(i) whether the plaintiffs have lawfully acquired native customary rights ("NCR") (as recognised by the laws of Sarawak, ie, Sarawak Land Code (Cap 81) and legislations that preceded the said Land Code and Iban Custom) over the area claimed herein; and

(ii) whether an order that the sixth defendant to recognise the plaintiffs' customary rights and/or to enter and or record the same in their registry and to issue the plaintiffs a document of title for the land, can be obtained by way of declaratory relief.

Consideration Of The Pertinent Issues

Issue (i): Whether The Plaintiffs Have Lawfully Acquired NCR (As Recognised By The Laws Of Sarawak, ie, Sarawak Land Code (Cap 81) And Legislations That Preceded The Said Code And Iban Custom) Over The Area Claimed Herein

[11] The relevant laws and principles are as follows. In the landmark decision of *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769, Datuk Ian Chin J agreed with the common law position in *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 3 CLJ 885; [1997] 1 MLJ 418 and which decision was affirmed by the Court of Appeal, *Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors* [1998] 2 CLJ 665; [1998] 2 MLJ 158 as that of Sarawak as well and he stated, *inter alia*, as follows:

> This journey through history is necessary because, and it is common ground - arising from the decision in *Mabo v. State of Queensland* (1992) 66 ALJR 408 which was followed in *Adong bin Kuwau & 51 Ors v. The Government of Johore* [1997] 1 MLJ 418 and which decision was affirmed by the Court of Appeal ([1998] 2 MLJ 158) - the common law respects the pre-existing rights under native law or custom though such rights may be taken away by clear and unambiguous words in a legislation. **I am of the view that is true also of the position in Sarawak.**
>
> (emphasis added)

[12] Datuk Ian Chin J in the same case further held that the plaintiffs' contention that "pulau" and "pemakai menua" are NCL recognised under the Sarawak Land Code 1958 and its predecessors and stated as follows:

> The existence of such native customary rights were also affirmed by the various Orders and legislation which I will refer to later when I come to consider how such native customary rights had been affected by them.

A This takes me to the next question of whether such native customary rights had been exercised by the Plaintiffs and their forefathers and whether they were exercised in the disputed area.

[13] Datuk Ian Chin J went on to hold as follows:

B To sum up, the Plaintiffs' right of **temuda**, **pulau** and **pemakai menoa** had survived all the Orders and legislation. They were exercised in the disputed area by the Plaintiffs and their ancestors until they were prevented to do so by the total destruction of the trees by the Defendants for the purpose of planting pulp trees after the issuance of the titles by the 3rd Defendant to the 1st Defendant.

C (emphasis added)

[14] On appeal, the Court of Appeal in *Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 3 CLJ 555, agreed with the High Court's decision on the law and "adat" of the plaintiffs there and at p. 571 of the law report, the Court of Appeal held, *inter alia,* as
D follows:

In respect of the other expositions of the law by the learned judge in relation to native customary rights we are inclined to endorse them. And briefly they are as follows:

E (a) that the common law respects the pre-existence of rights under native laws or customs though such rights may be taken away by clear and unambiguous words in a legislation;

(b) that native customary rights do not owe their existence to statutes. They exist long before any legislation and the legislation is only relevant to determine how much of those native customary rights
F have been extinguished;

(c) that the Sarawak Land Code 'does not abrogate whatever native customary rights that exist before the passing of that legislation'. However natives are no longer able to claim new territory without a permit under s. 10 of that legislation from the Superintendent of
G Lands and Surveys; and

(d) that although the natives may not hold any title to the land and may be termed licencees, such licence 'cannot be terminable at will. Theirs are native customary rights which can only be extinguished in accordance with the laws and this is after payment
H of compensation'.

[15] The Federal Court in *Superintendent of Land & Surveys, Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509 referred to *Nor Nyawai*'s case (*supra*) and *Adong*'s case (*supra*) and stated as follows:

I As for the fifth question our answer is that we wholly agree with the view expressed in *Adong bin Kuwau* and *Nor anak Nyawai* that the common law respects the pre-existence of rights under native laws or customs.

[16] Further the case of *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169, followed *Adong*'s case (*supra*) and *Nor Nyawai*'s case (*supra*) in the application of the common law in protecting the indigenous peoples' right over land. The Court of Appeal held, *inter alia*, at p. 195 of the law report as follows:

> I have given this part of the case anxious consideration and have arrived at the conclusion that the learned judge erred in not holding against the first defendant in respect of the ungazetted portion of the land. In my judgment after having correctly held:
>
> (i) **that the plaintiffs' customary communal title attached itself to the first defendant's radical title**; and
>
> (ii) that the first and fourth defendants were under a fiduciary duty "to protect the welfare of the aborigines including their land rights".
>
> The trial judge ought to have included the ungazetted area in question for purposes of compensating those settled there for the deprivation of their property rights.
>
> (emphasis added)

Whether The Plaintiffs Are Of Native Race

[17] It is undisputed that the plaintiffs are "natives" within the meaning of "native customary rights". Under the Sarawak Interpretation Ordinance (Cap 1), a native is defined to mean "a citizen of Malaysia of any race which is now considered to be indigenous to Sarawak as set out in the schedule; …".

[18] The schedule set out the following races (and any admixture of them with one another):

> Bukitans, Bisayahs, Dusuns, Dayaks (Sea), Dayaks (Land), Kadayans, Kalabits, Kayans, Kenyahs (including Sabups and Sipengs), Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs and Kanowits), Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagals, Tabuns and Ukits.

[19] This court noted that in the present case that the fourth, fifth and sixth defendants have not raised this issue at trial and/or tendered evidence to the contrary. At trial, it is further noted that the plaintiffs who are residents of Kampung Spaoh, Kampung Menat/Benat Ulu and Kampung Menat/Benat Ili, Gedong, Simunjan, Sarawak had given evidence that they are of the Iban race and there is no challenge.

Special Approach

[20] In *Agi Bungkong & Ors v. Ladang Sawit Bintulu Sdn Bhd & Ors* (Suit No: 22-93-2001-III(I)) [2010] 1 LNS 114, David Wong Dak Wah J (as he then was) laid down the following guidelines as to how courts should approach evidence in indigenous claims over customary lands and he stated, *inter alia*, as follows:

> This brings me back to the primary issue of proof by the plaintiffs. The first matter, which needs my attention, is the approach in dealing **with proof of NCR**. Kirby P (as he then was) sitting as the President of the Court of Appeal of the New South Wales Supreme Court in *Mason v. Tritlon* [1994] 34 NSWLR 572 at 588 observed that:
>
> > In the nature of Aboriginal society, their many deprivation and disadvantages following European settlement of Australia and the limited record keeping of the earliest days, it is next to impossible to expect that Aboriginal Australians will ever be able to prove, by record details, their present genealogy back to the time before 1788. In these circumstances, it would be unreasonable and unrealistic for the common law of Australia to demand such proof for the establishment of a claim to native title. The common law, being the creation of reason, typically rejects unrealistic and unreasonable principles.
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> In *Delgamuuk v. British Columbia* [1997] 3 SCR 1010, Lamer CJ had this to say on the appropriate approach in dealing with proof of aboriginal claims and I quote:
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> > In cases involving the determination of aboriginal rights, appellate intervention is also warranted by the failure of a trial court to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims when, applying the rules of evidence and, second interpreting the evidence before it. As I said in *Van der Peet* at p. 68:
> >
> > > *In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rule of evidence, to interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in for example, a private law torts case.*
> >
> > The justification for this special approach can be found in the nature of aboriginal rights themselves. I explained in *Van der Peet* that those rights are aimed at the reconciliation of the prior

> occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory. They attempt to achieve that reconciliation by 'their bridging of aboriginal and non aboriginal cultures' (at paragraph 42). Accordingly "act must take into account the perspective of the aboriginal people claiming the right .... while at the same time taking into account the perspective of the common law" such that "true reconciliation will, equally, place weight on each". (at paras 49 and 50)
>
> In other words, although the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly *sin generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. I however, that accommodation must be done in a manner which does not strain "the Canadian legal and constitutional structure" (at para 49). Both the principles laid down in *Van der Peel* - first that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and second, that trial courts must interpret that evidence in the same spirit-must be understood against this background.

Similar sentiments can be seen in the local case of *Hamit B Matussin & 6 Others v. Superintendent of Lands & Surveys & Anor* [1991] 2 CLJ 677 (Rep); [1991] 2 CLJ 1524, where Haidar Bin Mohd Nor J (as he then was) had at page 1526 (para G right) said as follows:

> In respect of native custom, s. 48 of the Evidence act 1950 provides:
>
> > 48. When the court has to perform opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence, if it existed, are relevant.

Cross on Evidence (Third Australia Edn.) listed four ways in which the existence of customs or usage may be proved. One of these four methods which is relevant to the present action is stated as follows:-

> The first method consists of the testimony of a witness who deposes, from his own personal knowledge, to the actual existence of custom or usage. He states that he is well aware of the facts that lessees in a given locality have been in the habit of removing "way going crops" that is crops grown by the tenant before the termination of his lease or of any other custom or usage. The evidence may be based on observation of many instances, and it may sometimes be based on reputation or hearsay.

I have no doubt the above principles are correct in law and I will now examine the evidence based on them. Let me also add that natives are the original inhabitants of the country and to treat claims for NCR by looking at it only from the point of ownership of the lands by the natives

A is not entirely correct. These claims should be looked at with the concept that the natives are part of the land as are the trees, mountains, hills, animals, fishes and rivers. My basis for saying this is simple. Prior to the arrival of white settlement there was no system of land ownership as we have now. There was no food processing factory then and they survived by foraging the land. The fruits on the wild trees, the fishes in the river, the wild boars and other animals on the land are their food for survival. It is not insignificant in this country that they are known as 'bumiputras'. It is my view that this concept must be kept at the forefront of our minds when dealing with native claims to lands.

(emphasis added)

[21] Bearing the above guidelines in mind, this court thus shall evaluate the evidence of the plaintiffs with a "special circumstance" approach, having regard to the difficulty of the witnesses in complying with the rigid standard rules of evidence in proving their customary practices that have existed since time immemorial.

Evaluation Of The Evidence

[22] This court finds that from the following testimonies of the following plaintiffs, there is ample evidence of the plaintiffs and/or their ancestors having practised native communal activities. The following witnesses and the relevant paragraphs in their respective witness statements are stated below:

(a) PW3, in paras. 4, 8, 10, 12, 13 and 14 of exh. WS-PW3;

(b) PW4, in paras. 4, 5, 8, 9 and 13 of exh. WS-PW4;

(c) PW5, in paras. 4, 5, 8 and 12 of exh. WS-PW5;

(d) PW6, in paras. 4, 5, 6 and 10 of exh. WS-PW6;

(e) PW7, in paras. 7, 8 and 9 of exh. WS-PW7;

(f) PW10, in paras. 4 and 5(a) of exh. WS-PW10;

(g) PW11, in paras. 4, 5, 6 and 7 of exh. WS-PW11;

(h) PW12, in paras. 3, 5, 6(a), 6(b) and 7 of exh. WS-PW12; and

(i) PW13, in paras. 4 and 6(a) of exh. WS-PW13.

[23] This court finds that evidence has been adduced by the plaintiffs, to show that there are evidence of inheritances from grandmothers to daughters, then from mothers to sons and some of the evidence adduced traced the inheritances from their great-grand ancestors and grand ancestors such as in the cases of Aki Ampieng, Aki Ugir, Aki Pitan and Aki Awan.

[24] Further the customary practices on the land claimed by the plaintiffs were carried out by the plaintiffs and their ancestors individually and as a composite of the village communities of Kampung Spaoh, Kampung Benat/Menat Ulu and Kampung Benat/Menat Ili.

[25] The origins of "adat" or customary practices such as that of the plaintiffs have been noted by a foreign historian, AF Porter, as having been in existence at the time of Rajah James Brooke's arrival in Sarawak in the 19th century. At p. 782 of the law report, Datuk Ian Chin J in *Nor Nyawai*'s case (*supra*) stated as follows:

> This is how AF Porter in his paper called "The Development of Land Administration in Sarawak from the rule of Rajah Brooke to the present time (1841-1965)", p. 18, stated it:
>
> > At the time of James Brooke's arrival in Sarawak there had been for centuries been in existence in Borneo and throughout the eastern archipelago a system of land tenure originating in and supported by customary law. This body of custom is known by the generic term "Indonesian adat". Within Sarawak the term "adat", without qualification, is used to describe this body of customary rules or laws; the English equivalent is usually "native customary law" or "native customary rights". …

[26] At p. 782 of the law report, Datuk Ian Chin J further stated:

> Therefore, I conclude that the plaintiffs and their ancestors had exercised those native customary rights known as temuda, pulau and pemakai menoa.

Evaluation As To Whether The Plaintiffs Carried Out Their Customary Practices In The Area Claimed

[27] This court adopts what Datuk Ian Chin J stated in *Nor Nyawai*'s case (*supra*) at para. (g) of p. 780 of the law report where he stated as follows:

> This question calls for a determination of the extent of the plaintiffs' pemakai menoa. That means finding its boundary which is defined by land features.
>
> …
>
> …
>
> Since, from what I can gather from the witnesses and authors, live revolves around the longhouse, the situation of a tembawai and of the longhouse will give an idea as to the possible extent of their pemakai menoa.

[28] The various locations of the plaintiffs' "pemakai menoa" were proved through the testimonies of the plaintiffs' oral history. In the present case, the evidence of oral history can be found in the witness statements of:

(a) PW3, in paras. 4, 5, 6 and 7 of WS-PW3;

(b) PW4, in paras. 4, 5, 6 and 7 of WS-PW4;

(c) PW5, in paras. 4, 5, 6 and 7 of WS-PW5; and

(d) PW6, in para. 4 of WS-PW6.

[29] In so far as to whether the location of the area claimed by the plaintiffs is proved, this court finds as follows. The rivers and streams stated in evidence are Batang Sadong, Sungai Spaoh, Sungai Jawey/Jai, Sungai Menat/Benat, Sungai Setambal, Sungai Empetir, Sungai Peliun, Sungai Sekadang, Sungai Balau, Sungai Perasa, Sungai Gulau, Sungai Maong, Sungai Nap and Sungai Ensengai. These are the rivers and streams where the plaintiffs claimed that their ancestors once settled and carried out cultivation. The plaintiffs' witnesses have testified that they use perahus to reach their farms and gardens, and to their communal forest to hunt, fish and collect jungle produce. These are stated in the following testimonies of the following witnesses:

(a) PW7, in para. 7 of WS-PW7;

(b) PW10, in para. 4(a) of WS-PW10;

(c) PW11, in para. 4.1 of WS-PW11; and

(d) PW12, in para. 5 of WS-PW12.

[30] The following witnesses who gave evidence of the above are presently practising the same traditional activities as passed down by their parents who are their "immediate ancestor":

(a) PW3 in para. 4 of exh. WS-PW3 stated that he was a descendant of Aki Sarjan Ampieng, who was his great-grandfather. He testified as to the plaintiff's descendents' settlement, cultivation and movement in the Sungai Benat/Menat area. In para. 10 of exh. WS-PW3, he stated that the "pioneering ancestors were shifting cultivators and farmers, hunters and jungle harvesters/collectors as such they have created many settlements, temuda land, orchards garden, tembawai within the area of Kampung Spaoh, Kampung Benat and Kampung Benat Ili". The other witnesses from Kampung Benat/Menat, ie, namely PW6, PW13 gave evidence of similar lifestyles as practiced by their ancestors. PW3 also leads the same lifestyle up to today; and

(b) PW4 who is from Kampung Spaoh, testified that he was a great-grandchild of Aki Ugir. He also testified about the oral history and movement of his people in the Spaoh area. He inherited lands from his parents and has worked in the same lands as his parents did. The other witnesses from the said kampung, namely PW5, PW7, PW10, PW11 and PW12 also testified about their inheritance of lands from their parents and are presently working as farmers in those lands. In support, identity cards of Rubber Holdings which were variously issued to their grandparents, parents or in-laws were produced as evidence. Other contemporaneous documents relating to governmental agricultural schemes were also produced, such as rubber planting schemes, acceptance letters and coconut planting schemes.

[31] The presence of old longhouse sites or tembawai inside or near the disputed area claimed by the plaintiffs and/or how near is the present longhouse site from the area is pertinent. This is to determine whether the disputed area is within reasonable reach of the plaintiffs and their ancestors, *viz*. "within the useful reach of the folks" as per Ian Chin J. This is a measurement by time and space. The historian AJN Richard, have recorded the Iban tradition of half a day's journey. The old longhouse sites of the plaintiffs are at places named Nap, Menat/Benat, Sebemban, Tajau and Bukit Anggat. The sacred sites of the plaintiffs are the ones stated in para. 9 of WS-PW3 and para. 10 of WS-PW4.

Pemakai Menoa

[32] It is noted that the court in *Nor Nyawai*'s case (*supra*) adopted three classifications of the term "pemakai menoa" and they are as follows:

(a) at p. 776 of the law report, the court stated:

> A pemakai menoa (also spelt pemakai menua), is an Iban term that refers to "a territorial domain of a longhouse community where customary rights to land resource was created by pioneering ancestors" (Dr. Dimbab Ngidang on Ethical Values of Sarawak Ethnic Groups, p. 33).
>
> (emphasis added)

(b) at p. 776 of the law report, the court also stated:

> Another description of it is in these words: "The family groups (bilek) join together to make a longhouse which, with the surrounding contiguous territory, make up the menoa. It includes besides farms and gardens, the water that runs through it and the forest round about it to the extent of half a day's journey (AJN Richards on *The Land Law and Adat*, p. 24).

(c) at p. 777 of the law report, the court stated:

> The more recent definition of a pemakai menoa, and which I accept to be equally accurate as those of the authors I have just referred to can be found in a paper presented at a seminar (called Seminar Pembangunan Tanah Pusaka Bumiputra on 29 September to 3 October 1994) by Tan Sri Datuk Gerunsin Lembat. He was the former president of the Majlis Adat Istiadat Sarawak and in that paper he said:
>
> > Pemakai menoa is an area of land held by a distinct longhouse or village community, and includes farms, gardens, fruit groves, cemetery, water and forest within a defined boundary (garis menoa).
>
> The purpose of creating a pemakai menoa involves the ritual ceremony of punggul menoa. After the ceremony has been performed, the first cutting of virgin jungle for settlement and

A farming can commence. From then onward, the community can establish its rights to the felled area, boundaries (garis menoa) are drawn between villages. These boundaries normally follow streams, watersheds, ridges and permanent landmarks.

Pemakai menoa includes cultivated land (tanah umai), old
B longhouse site (tembawai), cemetery (pendam) and forest area (pulau). …

[33] In the present case, the plaintiff adduced expert evidence on Iban customs and traditions of land through PW2 in exh. WS-PW2 whose expertise is derived from his former office as the former Deputy President
C of the Majlis Adat Istiadat Sarawak. In paras. 5, 6 and 7 of exh. WS-PW2, he testified on "pemakai menoa" and this court finds that his testimony is consistent with the definition of "pemakai menoa" as classified by *Nor Nyawai*'s case (*supra*).

[34] It is also noted that within the "pemakai menoa", there were other
D sub-categories of land within it. This is mentioned by Datuk Ian Chin J in the case of *Nor Nyawai* (*supra*) at p. 778 of the law report when he stated "Within a pemakai menoa, various parts of the land bear different descriptions":

(a) the first sub-category is tanah umai, and Datuk Ian Chin J stated at p. 778 of the law report as follows:

E

Tanah Umai

You have tanah umai which is land that had been cultivated with paddy or cash crops and this can be owned by the individual family of a longhouse that had cultivated the same and can be passed on to the family members. It can be lost to the whole community of
F the longhouse if the family pindah (moved) from the longhouse and it can be lost totally where the whole community had pindah.

(b) the second sub-category is temuda and Datuk Ian Chin J stated at p. 778 of the law report as follows:

G Temuda

Then there is temuda which is farm land and including land left deliberately fallow (see Lembat) for varying period of time to allow for the soil to regain its fertility and for the regeneration of forest produce.

H Later at p. 779 of the law report, Datuk Ian Chin J stated:

Since such temuda gives rise to a right of the natives to access it, so the description of temuda being "customary land" was used in *Abang v. Saripah* (Cases of Native Customary Law in Sarawak, p. 163).

I

(c) the third sub-category is tembawai and Datuk Ian Chin J stated as follows at p. 779 of the law report: A

> Tembawai
>
> Tembawai is a term for the old site of a longhouse (Lembat).

(d) the fourth sub-category is pulau galau and Datuk Ian Chin J stated as follows at p. 779 of the law report: B

> Pulau
>
> Finally we have pulau which is a term for primary forest preserved to ensure a steady supply of natural resources like rattan and timber and for water catchment, to enable hunting for animals to be carried out and to honour distinguished persons (Lembat). C

Further at p. 779 of the law report, Datuk Ian Chin J stated:

> Utong Anak Sigan, a witness called by the defendants, and who is a judge of the Chiefs Court and the penghulu of Sebauh sub-district testified to the custom of maintaining such a pulau and of its vital importance to the Iban community. These are his words: D
>
> > Yes, we preserve the jungle, a jungle so preserved is called a pulau galau. "Galau" means preserve. Purpose of preserving a virgin jungle is to enable the collection of timber for building boat, house, to collect ratan, to collect dau biro for building farm huts. To collect damar (resin) for sealing boat and for hunting wild animals. … Preservation of pulau galau is important for the survival of the Iban community. … E

[35] From the evidence adduced, this court finds that the plaintiffs have carried out their customary practices in the area claimed. F

Whether There Was Continuous Occupation?

[36] In so far as the plaintiffs' continuous occupation of land in the disputed area is concerned which is an essential element of a claim for native customary claim as stipulated by the Court of Appeal in *Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors And Another Appeal* [2005] 3 CLJ 555, where Hashim Yusoff JCA (as he then was) stated as follows: G

> **From the above two cases we note that the common feature which forms the basis of claim for native customary rights is the continuous occupation of land.** Further, we are inclined to agree with the view of the learned trial judge in *Sagong bin Tasi & Ors* (*supra*) that the claim should not be extended to areas where 'they used to roam to forage for their livelihood in accordance with their tradition'. Such view is logical as otherwise it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search for food. We note that even Mr. Baru in his submission hinged the claim of the H I

respondents over the Disputed Area on the assertion that they 'had been in continuous occupation and by express provisions of the law at the relevant time, been lawfully occupying the Disputed Area'. It is thus a matter of evidence adduced whether his submission can be sustained.

(emphasis added)

[37] The meaning of "occupation" was considered by the Federal Court in *Superintendent of Lands & Survey, Miri Division & Anor v. Madeli Salleh* (*supra*). Headnote No. 3 of the law report states as follows:

(3) On the issue of what is meant by "occupation", actual physical presence is not necessary. There can be occupation without physical presence on the land provided there exists sufficient measure of control to prevent strangers from interfering. Therefore, the fact that the respondent ceased to live on the said land prior to the fire which gutted the house on the said land in 1941 did not mean that he ceased to be in occupation of the said land. The evidence before the court clearly established that he continued to exercise control over the said land after the said period. The respondent could not, therefore, be said to have lost his right or interest over the said land by reason of abandonment or non-occupation of the said land. *Newcastle City Council v. Royal Newcastle Hospital* (foll); *Hamit Matusin & Ors v. Superintendent of Lands & Surveys & Anor* (foll). (para. 29).

(emphasis added)

[38] Arifin Zakaria FCJ (as he then was) in the above case, stated at para. 29 as follows:

[29] On the issue of what is meant by "occupation", we agree with the view of the Court of Appeal that actual physical presence is not necessary. There can be occupation without physical presence on the land provided there exist sufficient measure of control to prevent strangers from interfering: See *Newcastle City Council v. Royal Newcastle Hospital* [1959] 1 All ER 734; which was followed by the local case of *Hamit Matusin & Ors v. Superintendent of Lands & Surveys & Anor* [1991] 2 CLJ 1524; [1991] 2 CLJ (Rep) 677. Therefore, following the above authorities, the fact that the respondent ceased to live on the land prior to the fire which gutted the house on the land in 1941 that does not mean that he ceased to be in occupation of the said land. The evidence before the court clearly established that he continued to exercise control over the said land after the said period. The respondent could not, therefore, be said to have lost his right or interest over the said land by reason of abandonment or non occupation of the said land.

(emphasis added)

[39] From the evidence adduced by the plaintiffs, this court finds that there was continuous occupation of the lands claimed by the plaintiffs.

[40] In *Ara Aman & Ors v. Superintendent of Lands and Mines (2nd Div)* [1973] 1 LNS 5 (Cases on Native Customary Law) in Sarawak at p. 184, the same section of the Land Settlement Ordinance was also referred to by the court. There, 17 appellants claimed customary rights over certain land in Simanggang, second division. The said land apparently was gazetted as Government reserve. It was a fact that there were six notices gazetted affecting the said land in question before the declaration of the same as Government reserve. The question before the court was whether there was a continuous occupation of the land by the appellants. Dismissing the appeal, His Lordship BTH Lee J, referring to s. 66 of the Land Settlement Ordinance (Cap 28), said:

> No customary rights could have been acquired because there were no:
>
> (a) fruit trees;
>
> (b) no continuous occupation or buildings;
>
> (c) no burial grounds or shrines; and
>
> (d) no right of way.
>
> Section 66(b) provides that customary rights shall be recognised in respect of land that is in continuous occupation or has been cultivated or built on within three years.
>
> In the case before the court there is no evidence of continuous occupation and in fact no effective occupation at all (as to which I will say something presently).

[41] Further, at p. 192 of the law report, His Lordship BTH Lee J said:

> Turning to the questions of occupation, there is, in my opinion, no evidence to establish occupation in the present case. It will I think be useful to refer to what Lord Denning said in *Newcastle City Council v. Royal Newcastle Hospital*, on the meaning of occupation.
>
> > 'Occupation' is matter of fact and only exists when there is sufficient measure of control to prevent strangers from interfering"

[42] Applying the principles laid by the above cases to the present case, this court finds there are clear proof of continuous occupation. The definition of "occupation" as stated by Lord Denning above had been adopted in the Court of Appeal and approved in the Federal Court, in *Madeli*'s case (*supra*) where the Federal Court held, *inter alia*, as follows:

> With respect, the learned Judicial Commissioner erred in both these findings. With regards to his first finding that the appellant had lost his rights because he moved out of the land in 1941, the learned Judicial Commissioner seems to have ignored the testimony of the appellant that even after the fire had destroyed the house in 1941, the fruit trees were still there and he continued to visit the land once a month. The learned

Judicial Commissioner appears to have equated occupation with actual physical presence on the said land when that need not necessarily be so. In *Hamit b Matusin & 6 Ors v. Superintendent of Lands and Surveys & Anor* [1991] 2 CLJ 1524; [1991] 2 CLJ (Rep) 677, Haidar J (as he then was) accepted and applied the meaning assigned to the word 'occupation' by Lord Denning in *Newcastle City Council v. Royal Newcastle Hospital* [1959] 1 All ER at p. 736, where he said:

> Occupation is a matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering: see Pollock and Wright on *Possession*, pp. 12, 13. There must be something actually on the land, not necessarily on the whole but on part in respect of whole. No one would describe a bombed site or an empty unlocked house is "occupied" by anyone, but anyone would say that a "farmer" occupies the whole of his farm even though he does not set foot on the woodlands within it from one year's end to another.

The Sarawak Land Code (Cap 81)

[43] The pertinent sections in the Sarawak Land Code are ss. 2 and 5 of the Land Code (Cap 81) 1958. Section 2 defined the term 'native customary land' to mean:

(a) land in which native customary rights, whether communal or otherwise, have lawfully been created prior to the 1 January 1958, and still subsist as such;

(b) land from time to time comprised in a reserve to which s. 6 applies; and

(c) interior area land upon which native customary rights have been lawfully created pursuant to a permit under s. 10;

[44] This court notes that the Sarawak Land Code did not define what native customary right ("NCR") is and this court finds that native customary right referred in the Land Code must be in relation to NCR over customary land. The critical words in s. 2 of the Sarawak Land Code are "lawfully been created". Thus, native customary land is land over which native customary rights, whether communal or otherwise, has lawfully been created prior to the 1 January 1958, and still subsist as such.

[45] The words "lawfully been created", must necessarily mean, created in accordance with the law. Under art. 160(2) of the Federal Constitution, "law" had been defined "to include written law, the common law in as far as it is in operation in the Federation or any part thereof, and any custom or usage having the forces of law in the Federation or any part thereof".

[46] By virtue of s. 3(1)(c) of the Civil Law Act 1956, the common law of England and rules of equity, together with statutes of general application, as administered or in force in England on the 12 December 1949 applies to Sarawak subject to sub-s. (3)(ii) which states:

(ii) The Acts of Parliament of the United Kingdom applied to Sarawak under sections 3 and 4 of the Application of Laws Ordinance of Sarawak and specified in the second Schedule of this Act shall, to the extent specified in the second column of the said schedule, continue in force in Sarawak with such formal alterations and amendments as may be necessary to make the same applicable to the circumstances of Sarawak and in particular, subject to the modifications set out in third column of the said schedule.

[47] In the case of the Supreme Court of Sarawak, North Borneo and Brunei of *Sat Anak Akum & Anor v. Randong Anak Charareng* [1957] SCR 52 (Cases on Native Customary Law in Sarawak), Bodley J, held at pp. 67 to 68 of the judgment as follows:

I thus am faced with the very difficult task of deciding the following two questions both of which are of very great importance to the Sea-Dayak in the Second Division:-

Is a Pagan Sea-Dayak debarred by the customary law of his race from executing a will?

If he is not so debarred, can he by his will distribute his estate in a manner contrary to the customary law?

At the outset I must say that I fully agree with the two applicants that there is no ordinance providing for the execution of Wills by Dayaks as there is in the case of another native race, namely the Malays.

I also agree with the proposition that by virtue of the proviso to section 2 of the *Application of Laws Ordinance, No. 27 of 1949, Dayak Customary Law is in force in Sarawak and if any authority is required for that proposition, I would refer to the case of Chan Bee Neo and Another v. Ee Siok Choo in which case Hedges, CJ, dealt with the effect of the Law of Sarawak Ordinance, the provisions of which have been repealed and replaced by the Application of Laws Ordinance, No. 27 of 1949.* In his judgment at page 3, Hedges CJ, held as follows:-

The effect of the Law of Sarawak Ordinance is that the law of England, in so far as it is not modified by Sarawak Ordinances and insofar as it is applicable to Sarawak "having regard to the native customs and local conditions" is the law of Sarawak. The Supreme Court has interpreted this Ordinance, if not expressly at all events by implication, **as meaning that native law and custom will be respected and in a proper case must be applied.** But '**native custom**' means the custom of natives of Sarawak and the natives of Sarawak must belong to one of the races considered indigenous to the Colony and enumerated in the Schedule to the Interpretation Ordinance. The Chinese are not indigenous to this country and "Chinese Customary Law is not "native custom". The Law of Sarawak Ordinance uses the words 'native customs

A and local conditions', but I am not prepared to believe that it is the intention of the words 'and local conditions' to open the door wide for Chinese (or for that matter Hindu) customary law.

Having held that Dayak Customary Law is in force, it now behoves me
B to decide the question whether that customary law debars or prohibits a Sea-Dayak from executing a will. The evidence before me on this question is very meager, unsatisfactory and conflicting.

(emphasis added)

[48] This court finds that the recognition of the plaintiffs' NCR is founded
C both on common law principles and on the relevant statutes of Sarawak. (See the decision in *Madeli Salleh v. Superintendent of Lands & Surveys & Anor* [2005] 3 CLJ 697 (CA) and *Superintendent of Land & Surveys, Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509 (FC).

D **[49]** The original s. 5 of the Sarawak Land Code 1958 (before the said section was amended in May 2000 but the same was not gazetted to date) states as follows:

5(1) As from the 1st day of January 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified in subsection (2),
E if a permit is obtained under Section 10 upon Interior Area Land. Save as aforesaid, but without prejudice to the provisions hereinafter contained in respect of Native Communal Reserves and rights of way, no recognition shall be given to any native customary rights over any land in Sarawak created after the 1st day of January, 1958 and if the land is State land any person in occupation thereof shall be deemed to be in
F unlawful occupation of State land and section 209 shall apply thereto.

(2) The methods by which native customary rights may be acquired are:-

(a) the felling of virgin jungle and the occupation of the land thereby created;

G (b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

(d) the use of land for a burial ground or shrines;

(e) the use of land of any class for rights of way; or

H (f) any other lawful method:

Provided that-

(i) until a document of title has been issued in respect thereof, such land shall continue to be State land and any native lawfully in
I occupation thereof shall be deemed to hold by licence from the Government and shall not be required to pay any rent in respect thereof unless and until a document of title is issued to him; and

(ii) the question whether any such right has been acquired or has been lost or extinguished shall, save in so far as this code makes contrary provision, be determined by the law in force immediately prior to the 1st day of January, 1958.

[50] In *Jok Jau Evong & Ors v. Marabong Lumber Sdn Bhd & Ors* [1990] 2 CLJ 625; [1990] 2 CLJ (Rep) 169, Haidar Bin Mohd Noor J, (as he then was) said at p. 177 as follows:

> The question is whether native customary land is recognised by the law in the first place. It would appear to be so as under section 2 of the Land Code (Cap 81) 'Native Customary Land' means:
>
> (a) land in which native customary rights, *whether communal or otherwise*, have lawfully been created prior to the 1 January 1958, and still subsist as such;
>
> (b) land from time to time comprised in a reserve to which section 6 applies; and
>
> (c) Interior Area Land upon which native customary rights have been lawfully created pursuant to a permit under section 10;
>
> (emphasis added).
>
> For the present case, I think the plaintiffs are relying on (a) above. The plaintiffs filed this action as a representative of the Kayan community there and Kayan is a native race specified in the schedule to the Interpretation Ordinance. *As such it would appear that native customary rights whether communal or otherwise are recognised by the law ie, the Land Code of Sarawak (see sections 5 and 15 of the Land Code). In other words if native customary rights were established as at 1 January 1958 such rights shall subsist.* The plaintiffs, in that event, would have satisfied the qualification as to common interest ie, native customary right. In respect of common grievance, it would seem clear to me that by the Proclamation the Kayan as a community would be deprived of their alleged native customary rights over the land proclaimed. In the result if the relief claimed is successful the Kayan as a community will continue to have the benefits of their native customary rights even to the extent of entitlement to grant in perpetuity for agricultural purposes free of premium, rent and other charges under section 18 of the Land Code. *Even though native customary lands shall continue to be state land where no document of title has been issued in respect thereof, any native lawfully in occupation thereof shall be deemed to hold by licence from the Government and are not required to pay any rent as provided under section 5(2) of the Land Code. Section 15 of the Land Code provides protection of native customary rights where one of the provisions is for payment of compensation to the persons entitled to such rights.*
>
> Section 15(l) reads:
>
> > Without prejudice to section 18, state land shall not be alienated until all customary rights therein have been surrendered or extinguished or provision has been made for compensating the persons entitled to such rights.

A *Given the relevant provisions of the Land Code, if any member of the Kayan community can establish their native customary rights then such rights, in my view, are adequately protected by the law and if they can show or prove of infringement of their native customary rights then the Kayan natives having such rights will have such benefits if the relief claimed is successful.*

B (emphasis added)

[51] The plaintiffs' case is grounded on evidence of oral histories and documentary evidences. The testimonies of PW3 and PW4 dealt with the origins and movement of the peoples of Kampung Benat/Menat and Kampung Spaoh. The testimonies of the plaintiffs' other witnesses related to
C the encroachment of the said provisional leases issued to the various defendants and the making of Map M.

[52] PW3, is the tuai rumah and he stated that he knew about the consent given by the Rajah to the late Ampieng, from oral history and recalled of a formal letter documenting the consent. But he informed the court that the
D said letter was destroyed in a fire accident and explained that he could not remember the year Aki Ugir brought his followers to the area because he was not born yet at the time.

[53] PW5 produced the following exhibits which are as follows:

E (a) exhibit P-PBOD-27, a Coconut Planting Scheme No. S.256/64 issued by the Department of Agriculture;

(b) exhibit P-PBOD-25, a Coconut Planting Scheme No. S.252/69 issued by the Department of Agriculture; and

F (c) exhibit P-PBOD-3, an identity card of owner of Rubber Holding.

[54] PW3 testified as to the relationship between the names appearing in the exhibits with himself, the location of lands on which the exhibits were associated with, the walking distance of these lands from the kampung and the types of crop planted there.

G **[55]** This court finds that based on the testimonies of PW3, it is clear as follows:

(a) based on Kampung Menat/Benat's oral history, the presence of the plaintiffs' ancestors in the area is during the age of the third Rajah of Sarawak. This fact is corroborated by the existence of exh. P-PBOD-3,
H which was issued by the Rajah's Government at that time and the location of old longhouse sites and burial grounds;

(b) the existence of Kampung Menat/Benat is also acknowledged by the Sarawak State Government by virtue of the issuance of exh. P-PBOD-
I 25 and exh. P-PBOD-27; and

(c) Kampung Benat Hilir and Kampung Benat Hulu share the same origins.

Consideration Of The Testimonies Of The Plaintiffs' Witnesses

PW4

[56] In so far as the testimony of PW4 is concerned, the following exhibits were adduced by him and they are as follows:

(a) exhibit P-PBOD-17-20, a series of rubber planting schemes Sarawak;

(b) ID-PBOD-16, a rubber planting scheme issued by the Department of Agriculture, Sarawak;

(c) exhibit P-PBOD-12, a rubber planting scheme issued by the Department of Agriculture, Sarawak;

(d) exhibit P-PBOD-35, a police report; and

(e) exhibit P5(a) and exh. P5(b), being a formal letter and an oil palm smallholding licence from the Malaysian Palm Oil Board.

[57] This court finds that PW4 gave a satisfactory account of the said exhibits by, *inter alia*, explaining the connection of names appearing in the exhibits with himself, the location of lands on which the exhibits were associated with, the walking distance of these lands from the kampung and the types of crop planted there. This court also finds that based on Kampung Spaoh's oral history, the presence of the plaintiffs' ancestors in the area is before the age of the First Rajah of Sarawak. The fact of their existence is corroborated by the existence of old longhouse sites and burial grounds. The existence of the Kampung Spaoh community is recognised by the Sarawak State Government by the issuance of rubber planting schemes.

PW5

[58] PW5 testified that before the land on which was planted with coconuts under the coconut planting scheme, it was planted with paddy by his late father. As for the paddy planting scheme in Jawey, the villagers were subsidised with various aids of paddy planting. PW5 adduced, *inter alia,* the following exhibits in support:

(a) exhibit P-PBOD-21, an acceptance letter from the Department of Agriculture;

(b) exhibit P-PBOD-5, an identity card of owner of Rubber Holding;

(c) exhibit P-PBOD-24, an acceptance letter from the Department of Agriculture;

(d) exhibit P6(a) to (d), a record of minutes of meeting and the attendance list of the said meeting; and

(f) exhibit P7(a) to (i), a book keeping cash book.

[59] PW5 gave a satisfactory account of the said exhibits by, *inter alia*, explaining the connection of names appearing in the exhibits with himself, the location of lands on which the exhibits were associated with, the walking distance of these lands from the kampung and the types of crop planted there. The record of minutes of meeting, attendance list of the said meeting and book keeping cash book were produced to show that the plaintiffs have the consent and approval of the residents to bring this representative action.

[60] This court finds that PW5 has individual parcels of land that were inherited from his late father and those lands are ancestral lands that were inherited from father to son for more than a generation. The status of these lands was recognised by the authorities, *viz*. from the rule of the Rajah to the State Government of Sarawak.

PW6

[61] PW6 testified that the land in exh. P-PBOD-13 was planted with paddy before 1966. The land in exh. P-PBOD-15 was also planted with paddy before 1969. The land in exh. PDOB-22 was planted with paddy before 1972. These facts show that the lands have been in existence before 1 January 1958 as they were planted with other crops during the time of their ancestors before the introduction of the agriculture schemes. PW6 adduced, *inter alia*, the following exhibits:

(a) exhibit P10 (a), (b) and (c), the last will and testament of Ampieng anak Asin, the list herta and its supplementary list;

(b) ID-PBOD-2, a surat kebenaran;

(c) exhibit P-PBOD-13, a rubber planting scheme;

(d) exhibit P-PBOD-15, a rubber planting scheme;

(e) exhibit PDOB-22, an acceptance letter from the Department of Agriculture;

(f) exhibit PBOD-42, a Form F issued by the Penguasa Tanah dan Survei, Bahagian Samarahan;

(g) exhibit P-PBOD-43-44, a Form F issued by the Penguasa Tanah dan Survei, Bahagian Samarahan; and

(h) exhibit P-PBOD-45, a Form F issued by the Penguasa Tanah dan Survei, Bahagian Samarahan.

[62] PW6 also gave a credible account of the said exhibits by, *inter alia*, explaining the connection of names appearing in the exhibits with himself, the location of lands on which the exhibits were associated with, the walking distance of these lands from the kampung and the types of crop planted there. The Form F is evidence to show that the Sarawak State Government to some extent acknowledged the existence of the plaintiffs' NCR. Exhibit P10 would

show that the plaintiffs' ancestor, Aki Ampieng does exist as claimed by oral history. The oral history of the plaintiffs is credible as corroborated by exh. P10.

PW7

[63] PW7 testified, *inter alia*, that Kampung Spaoh and Kampung Lubuk Lalang are located in the area marked "A" and "X" on exh. P12(d) and the boundary between the two kampungs is at Sungai Jai Kudong. PW7 adduced the following exhibits:

(a) exhibit P12(a) to (h), a series of documents in chronological order and expressed to be Surat Pengesahan of Penghulu Hj Yaman bin Hj Sepawi of Kampung Gedong dated 30 October 1999, a sketch map bearing the seals of Penghulu Hj Yaman bin Hj Sepawi and KK Mikai anak Gunchit of Kampung Spaoh, Surat Pengesahan of TK Busri B Doing dated 30 October 1999, a sketch map bearing the seals of TK Busri B Doing of Kampung Lubok Lalang Gedong and KK Mikai anak Gunchit of Kampung Spaoh, Surat Pengesahan of KK Hj Meran A Bakar dated 30 October 1999, a sketch map bearing the seals of KK Hj Meran A Bakar of Kpg Gumpey Gedong and KK Mikai anak Gunchit of Kampung Spaoh, Surat Pengesahan of KK Jakim anak Sadid dated 30 October 1999 and a sketch map bearing the seals of KK Jakim anak Sadid of Kampung Sebemban and KK Mikai anak Gunchit of Kampung Spaoh;

(b) exhibit P13, a letter from Jabatan Tanah dan Survei Bahagian Samarahan;

(c) ID-14, the fourth defendant's map of Kampung Spaoh's NCR;

(d) ID-15, a forwarded copy of letter from fourth defendant to the Pegawai Daerah Simunjan dated 22 February 2001;

(e) exhibit P16, list of attendance of meeting dated 18 August 1967;

(f) exhibit P17, an agreement for exchange of lands;

(g) exhibit P18, extract of minutes dated 18 August 1968;

(h) exhibit P19, a letter dated 18 August 1968; and

(i) exhibit P20, a joint letter dated 18 August 1968.

[64] It is noted that that the above documents were in the possession of PW7's late father and they came into the possession of PW7 after the demise of his father. This court finds that the contents of exhs. P12, 13, 16, 17, 18, 19 and 20 are sufficient to prove that Kampung Spaoh's boundary with its neighbouring kampungs have been so well recognised since the time of their ancestors. Further, this knowledge of the boundaries was refreshed from time to time as shown by exhs. P16 to 20 and actual knowledge on the part of the fourth defendant about Kampung Spaoh's NCR land.

PW8

[65] PW8 testified and identified the co-ordinate point of Bukit Langkau Gawai on Map M and explained the method of identification. PW8 adduced the following exhibits:

(a) exhibit P21 (a) to (p), a notebook;

(b) exhibit P22 (a) to (e), a waypoints list;

(c) ID-23, an article about archaeological finds at Kampung Benat Hilir;

(d) ID-24 (a) and (b), an article entitled 'Arkeologi ditemui di Kampung Benat Hilir, Simunjan';

(e) exhibit P-PBOD-51-63, the photographs from pp. 51 to 63 of PBOD;

(f) exhibit PBOD-64/29, the gambar 29 at p. 64 PBOD; and

(g) exhibit P-PBOD-67, the Map M.

[66] This court finds that PW8 had explained the various exhibits tendered by him and this court finds that the waypoints of Map M were accurate and reliable because they were recorded in the notebook at each identified point where GPS readings were taken. The information recorded in the notebook corresponds with the waypoints list. This meant that the information entered into the software's computer corresponded with the waypoints list and the notebook.

[67] In so far as community mapping, this court finds that the status of a qualified surveyor is irrelevant and this court is guided by the case of *Agi Bungkong & Ors v. Ladang Sawit Bintulu Sdn Bhd & Ors* [2010] 1 LNS 114; [2010] 4 MLJ 204 (HC). In that case, David Wong J held in the following:

> [81] In proving the location of the NCR claims, PW5 was called to testify as to how he mapped the NCR area claimed by the plaintiffs. The maps produced by PW5 are exhs P7, P8, P10 and P11. PW5's qualification is set out in exh PW5 - and though not a licensed surveyor, I find him to be a competent witness in view of his experience in the field of mapping. In producing the maps PW5 had relied on the data collected by PW18 and Hydaeki Gani ak Ujai who were trained by PW5 as to how to collect the relevant data. In collecting the data, they, of course, relied on the boundary as told to them by the various communities of Sg Sepadok, Sg Selezu and Sg Setulai. Since I have found the evidence of the plaintiffs to be credible, I have no reason to doubt the veracity of data collected by PW18 and Hydaeki Gani ak Ujai. Accordingly, I accept the accuracy of the maps tendered in court delineating the boundary of NCR claims of the communities of Sg Sepadok, Sg Selezu and Sg Setulai.

The defendants in *Agi Bungkong* appealed to the Court of Appeal. The appeal was allowed but not on grounds that the trial judge had accepted the evidence of the community map.

[68] This court is also guided by the case of *Luking Uding & Ors v. Superintendent of Lands and Surveys Kota Samarahan Division & Ors* [2011] 7 CLJ 342 High Court in Sabah and Sarawak at Kuching (Suit No: 22-43-2002-I), where the courts have accepted the evidence of community mapping in proving the existence of native customary rights over land. PW10 states what a community map is:

> Community Mapping includes taking and recording the communal land boundary of the longhouses or villages based on information provided by the residents and elders of the longhouses or villages and the locations of the longhouses or villages, their gardens, farms, temuda, old longhouse sites (tembawai), cemetery (pendam), pulau, rivers and other landmarks within the communal land boundary of the longhouse or village.
>
> The recording of all these data or information are done with the participation of the residents and elders including the Tuai Rumah of the longhouse or village. When recording the coordinate points on the communal land boundary (antara/garis menoa) of the longhouse or village, it is also necessary to get the participation of the people of the neighbouring or surrounding longhouses or villages so that there will be no dispute on the land boundary when the data are printed on the map of the land boundary later on. The map of the land boundary must also be shown to the respective longhouses or villages after it was printed or plotted for their confirmation of the contents of the map.

[69] In *Numpang Suntai & Ors v. Quality Concrete Holdings Berhad & Ors* [2012] 1 LNS 752 (Suit No. 22-218-2010-II), the court held, *inter alia*, as follows:

> Whether Map "M" can be given any weight?
>
> Counsel for the government submitted that map "M" drawn by PW30 should not admitted into evidence or given any weight because he is not a registered surveyor. In support, he cited sections 17(a) and 20 of the Sarawak Surveyors Ordinance 2001 (Cap. 40) that reads as follows:
>
> > 17. Without prejudice to section 104 of the Code, no person, shall, unless he is a land surveyor-
> >
> > (a) practice or carry on business or take up employment as a licensed land surveyor or undertake any cadastral land survey in the State of Sarawak;
> >
> > …
> >
> > 20. No cadastral land surveyor survey plan thereof shall be accepted or adopted for the purpose of the Code or any other written law unless it has been approved by the Director of Lands and Surveys or by other officer authorized by him to approve survey plans on his behalf.

Counsel for the government cited the case of *TR Usah Lutong & Ors v. Lembaga Tabung Haji & Ors* [2009] CLJ 296 where the court used section 17 to reject a map prepared by an unregistered land surveyor. PW30 admitted in court that he is not a registered surveyor. He is what is known as a "community mapper". In *Luking Anak Udin & Ors v. Superintendent of Lands and Surveys Kota Samarahan Division & 3 Ors* Suit No. 22-43-2002-I, Linton J (as he then was) described 5 community mapping as follows:

> Community Mapping includes taking and recording the communal land boundary of the longhouses or villages based on information provided by the residents and elders of the longhouses or villages and the locations of the longhouses or villages, their gardens, farms, temuda, old longhouse sites (tembawai), cemetery (pendam), pulau, rivers and other landmarks within the communal land boundary of the longhouse or village.
>
> The recording of all these data or information are done with the participation of the residents and elders including the Tuai Rumah of the longhouse or village. When recording the coordinate points on the communal land boundary (antara/garis menua) of the longhouse or village, it is also necessary to get the participation of the people of the neighbouring or surrounding longhouses or villages so that there will be no dispute on the land boundary when the data are printed on the map of the land boundary later on. The map of the land boundary must also be shown to the respective longhouses or villages after it was printed or plotted for their confirmation of the contents of the map.

Incidentally, the community mapper in the above case was also PW30. He candidly admitted in court that the GPS (Global Positioning Device) that he used has a margin of error of 30 meters and that it would not be accurate in cloudy conditions. However, he did not say that he was hampered by bad weather conditions when he undertook his survey of the plaintiffs' boundary of communal lands. He told the court that he had undergone proper training to use the GPS device to chart community maps. He explained his training and method as follows:

> In those workshops and seminars, I have learned the methodology and techniques of mapping by first capturing or recording the geographical data by using GPS equipment. The geographical data captured or recorded consists of the coordinate of a point which is also known as a waypoint, on the field usually the geographical coordinate (longitude and latitude or easting and northing). The geographical data captured on the field are then stored in the GPS device own memory and the surveyor's field notes. The training also includes the learning of using the geographical data collected to do plotting on the government topographic map and how to transfer GPS data into the GIS. In producing a community map using GIS, the data stored in the GPS device would be queried and verify with the surveyor's field notes. Each waypoint would be identified and information regarding the waypoints would be inputted to build its attributes.

> The geographical data would then be ready to be displayed either in digital form or a hardcopy. For the purpose of our community mapping project, the hard copy would be printed for the community as their community map. In this particular case, I was responsible in taking and obtaining the geographical data which are the coordinate points to determine the extent of the boundary of the native customary rights (NCR) lands of Kampung Entanggor, Ensika, Lumut, Arus Dayak, Tongkah Dayak, Lubuk Manta, Tongkah Dayak Atas, Tongkah Dayak Rumah Panjai, Lunying, Belimbing Besi, Ketimbong and Bajong Ili, Bajong Ili Atas, Bajong Ili Tengah, Bajong Ili Baruh, Tongkah Dayak Rumah Panjai, Lunying, Belimbing Besi, Ketimbong and Bajong Ili, Bajong Ili Atas, Bajong Ili Tengah and Bajong Ili Baruh.

Counsel for the government submitted that his evidence was hearsay as the witnesses who supplied him the information necessary to draw the map were not called to testify. In my opinion, this is not hearsay as quite obviously PW30 has to ask the elders and other residents the extent of the communal lands to chart the boundary. PW30 testified that his map was based on the information supplied by the elders and villagers but that he personally recorded the geographical data (waypoints) necessary to produce the map that showed the extent of their communal lands. As for the argument of counsel for the government that PW30 contravened section 17(a) of the Sarawak Surveyors Ordinance 2001, I am of the view that there was no such contravention. In T*R Gayan ak Tupai & Ors v. Vita Hill & Ors* (Sibu High Court 21-4-2009) and *TR Sandah ak Tabau & Ors v. Kanowit Timber Sdn Bhd & Ors* [Civil Suit No. 21-2-2009], Yew Jen Kie J rejected the argument that a map prepared by the same witness as in the instant case is inadmissible on the ground that he is not a registered surveyor. Yew Jen Kie J said as follows in the former case:

> It is to be noted that PW2 did not hold himself out to be a land surveyor within the meaning of the Ordinance in preparing the Map. Nor did he certify the Map its accuracy within the meaning of the Ordinance. The Map was not produced for submission to the government authorities under the Land Code or any written law. It did not include a title survey, it was therefore not to use in connection with issuance or registration of land title. The Map was produced solely to be used as evidence in court proceedings for the Plaintiff.
>
> My understanding from reading ss 18, 19 and 20 of the Land Surveyor Ordinance is that if the Map is not used for submission for the purpose of the Code or any written law or for the purpose of lodging with the Lands and Surveys, it is not necessary to obtain approval of the Director of Lands and Surveys. As such, the Map marked M which is produced and used solely in the court as evidence does not need the approval of the Director of Lands and Surveys.

> Similar argument was advanced before me in the case of *TR Sandah ak Tabau & 7 Ors v. Kanowit Timber Sdn Bhd & 2 Ors* [Civil Suit No. 21-2- 2009 In the High Court in Sabah and Sarawak at Sibu). In rejecting the argument, I held that section 17 does not apply in this case because the witness in that case did not prepare the locality map with the purpose of practicing as land surveyor. He was merely, with the help of the elders of the longhouses, charting out the boundary of the claimed area.
>
> Similarly, I hold the view that PW30 did not contravene section 17(a) of the Sarawak Surveyors Ordinance 2001. I am also of the view that since map "M" is not being used for the purpose of the Land Code such as subdivision or approval of development plans, it does not fall foul of the requirement that it must be prepared by a registered surveyor. It is only being used to approximately demarcate the NCR boundary of villages over a wide area. Since the map is admissible, the only question left is the weight to be given to the map. PW30 is obviously an experienced community mapper. He is the same witness who gave evidence in several other NCR cases. He was honest enough to admit that his method is not suitable for work that requires a high level accuracy as the margin of error is 30 meters. However, as the boundary of the purported NCR area plotted by PW30 is over a wide area, the shortcoming in respect of precision in the method adopted by PW30 should make little difference. As PW30 is competent, in my view, weight should be given to Map "M".

PW9

[70] PW9 testified as follows:

(a) he confirmed of his stamp on exh. P12 (g) and (h) as annexed to WS-PW7. He also confirmed the contents in exh. P12 (g);

(b) he described the boundary between Kampung Sebemban and Kampung Spaoh. He also confirmed the attendance of the penghulu and ketua kampung on 30 October 1999; and

(c) there were no land titles being issued for lands in the said boundary and those lands were ancestral lands because they were planted with paddy.

PW12

[71] PW12 testified and adduced the following exhibits namely:

(a) exhibit P27 and exh. P28, two copies of rubber planting scheme;

(b) exhibit P29, an identity card of owner of Rubber Holding; and

(c) exhibit P30, a police report.

[72] In his evidence, PW12 stated that Rameli bin Dohamit's land is located next to his land at Bukit Sekadang. He cleared his own land for the rubber planting scheme. Later, he also cleared Rameli's land to make way

for the same scheme when Rameli transferred his planting scheme card to him. The witness has individual parcels of NCR land at Bukit Sekadang and that area is within the pemakai menoa of Kampung Spaoh. This land was encroached by the second defendant and had caused damage to the fruit trees that were planted there.

PW14

[73] PW14 is the Director of Sarawak Museum Kuching. He has been working at the museum since 1982. He was involved in the preparation and survey work of the archaeological finds at Kampung Benat Hilir on 7 November 2002. He was also the team leader of the survey work. The archaeological finds at Kampung Benat Hilir was marked as exh. P23.

[74] PW14 further testified that the report of the archaeological finds at Kampung Benat Hilir was quoted in some articles and is also on display at the Sarawak Museum. An article that quoted the said report was the one presented in 2010 at the International Seminar on Bornean Archaeology.

[75] From the testimony of PW14, this court finds that Kampung Benat Hilir is a settlement. This is clearly stated at p. 207 of the NOP, lines 15 to 18:

> Q: Put I refer you to the 4th line, "Benat Hilir was probably a settlement and the finds could have been made by …". I put it to you that there was a probability that Benat Hilir was not a settlement by reading at this line. Is that true?
>
> A: No. Benat Hilir was a settlement of some sort.

[76] That the last occupants of the area were Ibans. This is clearly stated at p. 208 of the NOP, lines 4 to 7:

> Q: I refer you to 3rd page, 1st paragraph, last line (Shown to the witness). It states that its early occupants were the Melanau and then followed by the Malay and Iban. How did you come about this finding?
>
> A: This sentence was based on literature review and oral tradition.

The Testimonies Of The Defendants' Witnesses

[77] The fourth, fifth and sixth defendants called three witnesses to testify on their behalf namely DW1, DW2 and DW3. DW1 is a photogrammetry expert in the employ of the fourth defendant and his evidence, *inter alia*, consisted of Royal Air Force aerial photographs or exh. D1 and the interpretation report of the said photographs or exhs. D3(1) to (10). DW2 is the divisional superintendent of the fourth defendant whilst DW3 is the head of licensing division of the fifth defendant.

DW1

[78] It is noted that PW1 and DW1 gave evidence concurrently as part of the "tubbing system" on the examination of witnesses. PW1 is the expert witness of the plaintiffs and his evidence is the tendering of the interpretation report on exh. D1 and his said interpretation report was marked as exh. P2. According to the evidence of PW1, in the disputed area claimed by the plaintiffs, there were three different types of primary forest, *viz* riverine forest, lowland evergreen tropical rainforest and dense kerangas forest. When cross-examined by PW1, DW1 agreed that the cultivation mosaics of at least 300 hectares are located in identical regions in both of their reports.

[79] The comparison between exh. P2 and exhs. D3(1) to (10) can be found in exh. P4 which forms part of the basis of the fourth, fifth and sixth defendants' cross-examination of PW1. The agreement section of exh. P4 shows that exh. D1 is the aerial photograph of the subject area as represented in Map M. The size of the area of interest was agreed to be 8,001 hectares.

[80] The cultivation mosaic as agreed by both the experts for the plaintiffs and the defendants, namely PW1 and DW1, meant that there was a farming community in existence in the area at the time when exh. D1 was made. It was also agreed that the area of interest was predominantly covered by primary forest, although the acreage differs between the experts of the plaintiffs and the fourth, fifth and sixth defendants. On the issue of primary forest, PW1 stated in the "results" section of exh. P2, at p. 8, as follows:

> Primary forest dominates in this region and covers 83% (Figure 1) of the case area. Beside this Tropical Lowland Evergreen Rainforest or mixed Dipterocarp forest two other natural forest types were identified. They had been classified as "Dense Forest" and "Riverine Forest". Both forests show no anthropogenic impact in the aerial photographs, so they also can be considered as "Primary Forest", which raises the percentage of untouched forests to 91% of the area.
>
> The Dense Forest in the centre of the area is caused by different growing conditions (soil, etc.) and is clearly related to an altitude higher than 90m. Very probably this class matches the vegetation type "Heath Forest" (Kerangas).
>
> In the western part along the river a specific Riverine Forest type can be distinguished in the photographs. Such vegetation is adapted to regular flooding periods. Under tropical conditions like in Sarawak this vegetation type is known and described as "Peat Swamp Forest".

[81] Thus it is generally accepted that human activity could not have been carried out in the area identified as primary forest. The same assumption could also be drawn on the areas identified as disturbed forest, wherein PW1 states in the next following paragraph:

The Disturbed Forest polygon in the centre of the area adjacent to the "Dense Forest" must not necessarily be caused by human activities. Also here natural variations of growing conditions might be the reason for lesser canopy closure.

[82] As such, this court finds that the remaining areas in the area of interest, should be NCR land, consisting of approximately 300 hectares of cultivation mosaic as found in identical regions by both PW1 and DW1.

DW2

[83] DW2's main contention is that the infringing provisional leases were issued over areas of land that were covered with primary forest. As such, the said provisional leases could not have been issued over the NCR lands of the plaintiffs. This contention can only be determined by reference to exh. P4. The association between these two pieces of evidences came to light during DW2's cross-examination at p. 238 of the NOP, lines 9 to 31 and at p. 239, lines 2 to 6, and is in the following:

Q: Refer to the Land Use Map marked as "TB-18" (now Exhibit D21). And I refer you to Paragraph 14 of WSDW2. Whose finding was it that the said Land covered under the provisional leases is all forested area and there was no clear area?

A: This is my finding.

Q: Refer you to Exhibit DBD2, page 11 is the curriculum vitae of Lim Siau Chung, marked as Exhibit D2 (1) to (5). Mr Lim Siau Chung was called as the first witness in this trial, DW1. Do you know DW1?

A: Yes.

Q: Am I correct to say that DW1 was the officer tasked to interpret aerial photographs taken over the said Land that is in dispute in this case?

A: Yes.

Q: Do you agree with me that DW1 is more qualified than you to interpret aerial photographs?

A: I disagree.

Q: I refer you to Exhibit DBD2, pages 7 and 8 marked as Appendix A and Appendix B (shown to witness). Do you agree with the interpretation and findings of DW1 in this Appendix A and Appendix B?

A: Yes, I agree.

Q: I put to you that, after perusing Appendix A which is the interpretation of aerial photographs taken in 1947 and Appendix B which is the interpretation of aerial photographs taken in 1962, it is incorrect for you to state as you have in Paragraph 14 of WSDW2 that "there was no cleared area". Do you agree?

A: Yes, I agree.

[84] Thus in the light of the above, the said provisional leases issued by the fourth defendant have to be evaluated, to ascertain whether they encroached into the cultivation mosaic.

[85] The fourth defendant issued the said provisional leases over Lot No. 1230 of Sedilu-Gedong Land District, Lot No. 1509 of Bukar Sadong Land District, Lots No. 886 and 887 of Samarahan Land District, to the second defendant. A provisional lease over Lot No. 1229 Block 19 of Sedilu-Gedong Land District was also issued to the third defendant. The locality of land for Lot No. 1230 and Lot No. 886 was expressed to be Sungai Ensengei, Samarahan. The locality of land for Lot No. 1509 and Lot No. 887 was expressed to be Ulu Sungai Ensengei, Samarahan whilst the locality of land for Lot No. 01229 was expressed to be between Tanjung Sap and Sungai Benat Besar, Simunjan.

[86] The fifth defendant issued Timber Licence No. T/8393 to the first defendant over the area at Bukit Sekadang, Bukit Menat and Bukit Langkau Gawai. The locality of the said timber licence was stated to be "within the provisional leases of Lots 886 and 887 Samarahan Land District, Lot 1230 Sedilu Gedong Land District, part of Lot 1509 Bukar Sadong Land District as shown on the map Misc. Drg. No. 1586 attached (14,314 hectares)".

[87] The plaintiffs relied on Map M ("exh. P-PBOD-67") and on the "Map of Samarahan Division showing archaeological sites" that form a part of annexure NAS-3 in WS-PW8 ("exh. P23"). The fourth, fifth and sixth defendants relied on the Land Use Map 1956 (exh. D21) and the locality map of OT8393.

[88] The said Map M showed the NCR land of the plaintiffs as shaded in light blue stripes and bordered by broken brown lines. The said Lot 1230 is shaded in green stripes and it overlaps with the said NCR at roughly, its southern portion. The said Lot 1229 is shaded in yellow stripes and almost its entire portion overlaps with the said NCR. Lot 1509 is shaded in light blue with green stripes and it overlaps at its northeast portion. Lot 887 is shaded in light blue and it overlaps at its eastern portion. Lot 886 is shaded in white with light brown stripes and it overlaps at its southernmost tip. The overlapping portions of Lots 1230, 1229, 1509 and 887 are within the rubber gardens and temuda of the plaintiffs. The major river shown in the disputed area is Sungai Ensengei.

[89] Even though the map of Samarahan division showing archaeological sites is a general map on the division, it nevertheless showed the location of Sungai Ensengei. The archaeological site No. 4 is of significance as it is one of the kampungs of the plaintiffs', namely Kampung Benat or Menat. The site is located near the banks of Batang Sadong and on the east of Sungai Ensengei.

[90] The locality map of OT8393, locality Map A of Forest Licence No. T/5097, Forest Type Map "B" Ensengei Forest Reserve and Misc. Drg. No. 1586 showed that Sungai Ensengei is exactly in the same location as it were in Map M. The Forest Type Map "B" Ensengei Forest Reserve that clearly shows the existence of temuda and rubber gardens within the area of the reserve as explained in the reference section. There are also areas of non-forest. This map was prepared on 24 August 1964. The focal point between the maps of the plaintiffs and the fourth, fifth and sixth defendants is the location of the two main rivers that connect the matter in dispute between the parties that is Sungai Batang Sadong and Sungai Ensengei.

[91] The location of the cultivation mosaic as agreed by the parties is at the centre of the area of interest. In the plaintiffs' evidence, PW1 testified in the following at the last paragraph of p. 8 in exh. D1:

> Three positive anthropogenic clearings in the centre of the area are mapped. The biggest with nearly 30ha shows sign of former shifting cultivation and is now under succession for the biggest parts.

[92] In the fourth, fifth and sixth defendant's evidence, DW1 confirmed in appendix A of exh. D3(1) to (10) that these cultivation mosaics also appeared in the Forest Type Map "B" of the Ensengei Forest Reserve. In applying these findings to exh. P-PBOD-67, this court finds that the said Lots 1230 and 01229 overlaps with the cultivation mosaics at the centre of the NCR Land. Thus the issuance of the said provisional leases by the fourth defendant was over the NCR Land claimed by the plaintiffs.

[93] DW3 testified that part of the area claimed by the plaintiffs to be their NCR land actually forms part of the former Ensengei Forest Reserve, of which no native customary rights were conceded or claimed at the time of its constitution. Thus, the plaintiffs have wrongly asserted their NCR claims over this area of land that is now de-constituted and issued as provisional leases and timber licences. In support, various documentary evidences were adduced to show that the said forest reserve was constituted and the publication of statutory notifications.

[94] This court finds that exh. P4 be resorted to determine the more pertinent question about the evidence of DW3, *viz*:

> Did the land area subsumed by the Ensengei Forest Reserve include the cultivation mosaic at the centre of the area of interest?

[95] This court finds as follows:

(a) the location of the first defendant's logging permit OT/8393 which was issued by the fifth defendant after the said forest reserve was deconstituted can be found in exh. D24. The land area comprising OT/8393 was generally the Ensengei Forest Reserve;

A (b) exhibit P4 showed that there were three cultivation mosaics at the centre of the area of interest; and

(c) Forest Type Map "B" of the Ensengei Forest Reserve showed the existence of temuda and rubber gardens within the area of the Forest Reserve.

B

[96] In light of the above findings, this court finds that it is fair and reasonable to conclude that the NCR land of the plaintiffs formed part of the Ensengei Forest Reserve.

[97] Finally, exh. D25 (appendix A) which is the gazette notification of C the Ensengei Forest Reserve and a description of its boundary in the schedule thereto includes Sungai Ensengei, a tributary of Batang Sadong. PW12 in para. 5 of exh. WS-PW12 states as follows:

> 5. The following documents are in my proper custody and control at all material time. They are:
>
> D a. Rubber Planting Scheme issued by the Department of Agriculture, Sarawak under index no. N984/SJ/1/66 and dated 12.01.1966.
>
> This rubber garden is located at Bukit Sekadang. The size of this rubber garden is around 3 acres. In the past, I used to go there E on foot. It took me one and a half hours to reach there from Kampung Spaoh. Presently, I cycle and will reach the land in about half an hour. I was the person who merimba this land in early 1950s. It was before I got married to my wife, Lanun anak Undeng, in 1956. I was twenty years old at that time, even though the identity card would show that I was only 13 years F old then. The said land was first cleared for padi planting, then I used this land to participate in the said rubber planting scheme. Today, I still tap rubber there. This land is near to our kampung's hutan pulau or communal forests. This communal forest is where Tembawai Langkau Gawai is located. This is the place where our people hunt, fish and collect jungle produce G since the time of our ancestors. We still practice the same customary activities as our ancestors to this day. **Our people will do these activities to as far as Sungai Ensengai.** …
>
> (emphasis added)

H **[98]** From the above testimony, this court finds that the testimony showed that there are customary activities practised by the inhabitants of Kampung Spaoh, even at the time of their ancestors, in the locality of Sungai Ensengei. Thus at the time when the said forest reserve was constituted on 8 December 1961, the plaintiffs' native customary rights were already created and in existence.

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Issue (B) Whether An Order That The Sixth Defendant To Recognise The Plaintiffs Customary Rights And/Or To Enter And Or Record The Same In Their Registry And To Issue The Plaintiffs A Document Of Title For The Land, Can Be Obtained By Way Of Declaratory Relief

The Defendants' Contentions

[99] The fourth, fifth and sixth defendants contend that the plaintiffs are asking this court to step into the shoes of the settlement officer to determine whether the plaintiffs have any customary rights over purported area claimed by them. Section 84 of the Sarawak Land Code (Cap 81) states as follows:

> (1) Whenever it appears to the Director that in any area there may be doubt or uncertainty as to whether the existing documents of title properly define the rights and interests of those entitled or the boundaries of the land included therein, or where it appears likely that rights of ownership have been acquired by natives by the exercise of their customary rights, or whenever for any other reason he is of the opinion that is expedient to effect a settlement rights, he may publish in the Gazette a Setttlement Notification in accordance with subsection (2).
>
> (2) …
>
> (3) On or after the publication of the Settlement Notification under this section, the Director shall assign a Settlement Officer and such Assistant Settlement Officers as may be necessary to carry out a settlement.

[100] The fourth, fifth and sixth defendants further contended that s. 95(1) of the Sarawak Land Code (Cap 81) provides as follows:

> (1) The Settlement Officer shall investigate publicly all claims to State land, whether based upon documentary evidence, native customary tenure or otherwise, and shall have power to determine in which favour the rights to such land shall be shown in the Settlement Order made under section 95 or may, in the case of conflicting claims, permit the parties to refer the determination of the same to arbitration under the Arbitration Act 1952.

[101] Further reliance is placed on s. 95 of the Sarawak Land Code (Cap 81) which provides that:

> (1) After full investigation and final determination of all claims, the Settlement Officer shall make a Settlement Order which shall be in Form E in the First Schedule and shall contain any other particulars which may be prescribed by rules made under section 213.
>
> (2) Every Settlement Order is shall be published in the Gazette, and copies thereof shall, at the same time and for a period of one month thereafter, be exhibited at the office of the Superintendent in whose division, and at the office of the District Officer whose district, the land is situate and add any other place which may be prescribed.

A (3) After the publication of the Settlement Order, the Settlement Officer may buy not this in the Gazette, with copies exhibited in the same manner as in the case of the Settlement Order, correct any clerical errors and make any clerical amendments or additions to the Settlement Order, as may be necessary to give effect to his decision.

B **[102]** In the light of the above, the fourth, fifth and sixth defendants thus contended that the determination as to whether the rights of ownership over State land have been acquired by natives by the exercise of their customary rights is solely founded on the settlement officer assigned by the Director of Land and Surveys, Sarawak pursuant to s. 84(3) of the Sarawak Land Code (Cap 81).

C

[103] The Sarawak Land Code (Cap 81) also provides for the procedure as to the determination of any State land where it appears likely that rights of ownership has been acquired by native by the exercise of the customary rights. In *Professor Dr A Kahar Bador & Ors v. N Krishnan & Ors* [1982] 1 LNS 103; [1983] 1 MLJ 412 at p. 414, the High Court refused to issue a declaration in matters covered by the statutory provision without exhaustion of the remedy provided nearby, namely reference of the dispute to the Registrar-General. See also *Manggai v. Government of Sarawak & Anor* [1970] 1 LNS 80; [1970] 2 MLJ 41, where the plaintiff had a land dispute with the defendant which was decided in his favour by the District Native Court. In an appeal, the resident's Native Court reversed the judgment. The plaintiff then applied to the High Court for a declaration that the decision of the resident's court was void. There was a provision in the law for stating a case on a point of law or native custom to the Native Court of Appeal. The plaintiff did not utilised this procedure. The Federal Court in refusing his application for a declaration, held that he should have used the procedure laid down in the law by way of appealing to the Native Court of Appeal which was presided over by a High Court Judge and was thus competent to decide any question of law. The court ruled that no declaratory judgment would be made when there was an adequate alternative remedy available.

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The Plaintiffs' Contentions

[104] The plaintiffs on the other hand contend otherwise.

[105] This court finds that the fourth, fifth and sixth defendants' contentions are without merits. Guidance is sought from the case of *Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors* [2010] 10 CLJ 383 where YA Rhodzariah Bujang JC (as she then was) held, *inter alia,* as follows:

H

[15] Ms Yap Khan Kee appearing for the public authorities and the Government of Sarawak in this case has also referred me to ss. 84 and 94 of the Land Code. Section 84 gives the Director of Lands & Surveys the power to decide on, among others, acquisition of native customary rights by publication of a settlement notification and appointment of a settlement officer who under s. 94(1) "shall investigate publicly all claims

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to State land, whether based upon documentary evidence, native customary tenure or otherwise ...". She submitted that in view of the express procedure for determination of the plaintiffs' rights under the Land Code, resort to the court for these declaratory reliefs should not be allowed and cited the case of *Professor A Kahar Badar & Ors v. N Krishnan & Ors* [1983] 1 MLJ 412 and *Manggai v. Government of Sarawak & Anor* [1970] 1 LNS 80 in support of her submission.

[16] *Prof Dr A Kahar*'s case concerns a dissatisfaction in the management of a co-operative society and in which the plaintiffs sought to declare themselves as the elected members of the committee of management of the Society but the court refused the declaration on the ground that the disputes should have been referred to the Registrar-General of Cooperative Society and the writ of summons was set aside on that ground.

[17] In *Manggai*'s case, similarly, the Federal Court dismissed the plaintiff's action for a declaration that the Resident's Native Court was *functus officio* and had no jurisdiction to determine an appeal from the Native District Court in respect of a decision relating to a dispute over land which the plaintiff had with one Tawi ak Selaku. It held that where there was an alternative remedy available to the plaintiff, he must pursue that remedy first (ie, an appeal to the Native Court of Appeal). The Federal Court held, quoting *Halsbury's Laws of England* and the case of *Barrachough v. Brown* [1897] AC 615 that the court will not make a declaratory judgment where an adequate alternative remedy is available.

[18] The argument canvassed by Ms Yap Khan Kee here is, at first blush, compelling. It would appear from the quoted provisions in the Land Code there is already a mechanism available to determine the plaintiffs' claim of native customary rights over the land and it seems to me that there is force, in the wordings of the statute for the settlement officer to inquire into that claim. If he chose not to do so or if a person is aggrieved by his decision, the proper recourse is to apply to the court to compel him to decide or to review his decision if it has been made and these could be done by way of a writ of *mandamus* or *certiorari*. *However, in my opinion, this procedure is only available for land which have yet to be touched by the government and not when the government, through its agencies such as the 4th and 5th defendants have taken definitive action which have compromised the status of the land. It is impossible for the plaintiffs to ask the Director of Lands & Surveys and the Settlement Officer to decide on their claim to be so entitled to the land when the Director of Lands & Surveys himself had issued the 4th and 5th defendants with the leases (at that time). Similarly for the licence. The fact that it was issued and the leases were granted, it can be implied that the government through these agencies have decided that the plaintiffs have no native customary rights over the land in dispute. Put simply, the plaintiffs are not in any position to have their rights determined by the very agency who has denied them of it. The plaintiffs therefore have no other alternatives open to them but to go to court for the determination of their rights over the land.*

A On this point of law raised, a clear distinction must be made between the office of the Settlement Officer and a tribunal and a court of arbitration. It must be stated at the outset that the Settlement Officer is not a tribunal or a court of arbitration, as was, in due respect, mistakenly asserted in the 2nd and 3rd Defendants' submission. This error on the role of the Settlement Officer is apparent in the statutory provisions cited in support B of this point.

(emphasis added)

[106] Further in *Simo Sekam & Ors v. Naim Cendera Sdn Bhd & Ors* [2012] 1 LNS 832, Sangau Gunting J held as follows:

C 7. As to whether the Plaintiffs' action is in effect tantamount to asking the court to step into the shoes of the 'Settlement Officer' concerning determination of existence or otherwise of NCR, the 2nd and 3rd Defendants' argument, with respect, seems to have overlooked the fact, that the Plaintiffs' very complaint in the instant suit pertains substantially to the Defendants' implicit failure to exhaustively fulfil the requirements D of *inter alia* Section 84, 94 (1) and 95 of the Sarawak Land Code (Cap 81). But perhaps, more to the point is this: that the aforesaid contention seems also indicative of an assumption on the part of 2nd and 3rd Defendants that the Plaintiffs' claim has nothing to do with NCR whose creation may relate to the time when the Sarawak Land Code and other related E statutes were not yet in existence.

8. Since the issue at hand involves possibly pre-existing rights pertaining to NCR, the overall issue of existence or otherwise of NCR is so intrinsically inter wined with existence or otherwise of pre-existing rights, that the contention of equating the Plaintiffs' instant action to stepping into the shoes of the Settlement Officer, would appear no longer F sustainable. Otherwise, such contention would tantamount to wrongly applying statutes to private rights which statues in any case were not in existence at the time the alleged creation of those private rights commenced.

[107] Further guidance can be found in *Racha Urud @ Peter Racha Urud & Ors v. Ravenscourt Sdn Bhd & Ors* [2012] 1 LNS 92 where Stephen Chung Hian G Guan JC (as he then was) held as follows:

36. The last question is whether it is proper for the Plaintiffs to file this suit when the Land Code specially provides that the Settlement Officer shall investigate publicly all claims to State land whether based upon native customary tenure or otherwise. The Defendants specifically H referred to s. 94(1) of the Land Code. The Defendants submitted that the Land Code provides a mechanism or process for a native claiming State land by native customary tenure to lodge a claim with a Settlement Officer who shall then investigate publicly the claim to the State land. The Defendants submitted that the Land Code has provided an alternative remedy to the Plaintiffs and as the Plaintiffs have not pursued the I alternative remedy available to them, it is not competent for them to file this action in the High Court. The Defendants referred to the case of

Manggai v. Government of Sarawak & Anor [1970] 1 LNS 80; [1970] 2 MLJ 41 and other authorities in support of their submissions. See also *Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2010] 9 CLJ 505; [2011] 3 AMR 59.

37. In *Manggai*'s case, the plaintiff commenced an action in the district native court over a land dispute between himself and another native. The district native court decided the case in his favour. The defendant appealed against the decision to the Resident's native court which allowed the appeal. Instead of appealing against that decision to the Native Court of Appeal, the plaintiff commenced an action in the High Court for a declaration *inter alia* that the judgment of the Resident's native court was null and void. The High Court refused the application and the plaintiff appealed to the Federal Court.

38. Under s. 8(1)(d) of the Native Courts Ordinance an appeal, by way of a case stated on a point of law or native custom, lies from the decision of a Resident's native court to the Native Court of Appeal which is to be presided over by a Judge (of a High Court). The Federal Court in refusing the appeal held that it is settled law that the court will not make a declaratory judgment where an adequate alternative remedy is available. *Manggai*'s case can be distinguished on the facts of that case. In *Manggai*'s case, it was mandatory for a party who was not satisfied with the decision of the Resident's native court to appeal to the Native Court of Appeal.

39. Section 84(1) of the Land Code provides that whenever it appears to the Director that in any area there may be doubt or uncertainty as to whether the existing documents of title properly define the rights and interests of those entitled or the boundaries of land included therein, or where it appears likely that the rights of ownership have been acquired by natives by customary rights, or for any other reason he is of the opinion that it is expedient to effect a settlement of rights, he may publish in the Gazette a Settlement Notification in accordance with subsection(2). The Settlement Officer shall then cause a preliminary notice of the intended survey to be published of the block of land at the office of the District Office and at convenient places in the neighbourhood of such block: s. 85(1).

40. Section 86(1) provides that no proceedings concerning the rights to land in any block within the area for which the Settlement Notification has been published shall be commenced in any court. Section 86(2) provides that any proceedings commenced before the notification is published may be continued. Section 93(1) provides that all claimants to State land in the block shall appear at such time as the Settlement Officer may by notice direct and then s. 94(1) provides that the Settlement Officer shall investigate publicly all claims to State land.

41. *Reading the above provisions of Part V of the Land Code, s. 94(1) should not be read in isolation. Section 86(1) clearly states that no proceedings concerning rights to land in any block within the area for which a Settlement Notification has been published shall be commenced in any court. Further, the provisions of s. 84 are not mandatory in nature and there is no evidence that a Settlement Notification has been*

published respecting the lands claimed by the Plaintiffs so that the claim will be investigated and determined by the Settlement Officer and which prohibits or prevents them from commencing this action against the Defendants. The above provisions also did not expressly oust the jurisdiction of the High Court. There is no merit on this ground to strike out the Plaintiffs' action.

(emphasis added)

[108] Thus, in light of the above authorities, this court finds that the procedure under s. 94(1) of the Land Code (Cap 81) does not apply in the present case as the subject-matter land is not a land which has to be 'touched' by the Government or where a settlement notification has been published. It follows that the procedure of appeal to the Native Court of Appeal did not arise at all on the ground that the said subsection in the Code has not come into operation.

Order

[109] In light of this court's above findings, this court finds that the plaintiffs have proved their case against the fourth, fifth and sixth defendants on a balance of probabilities and grants judgment against the fourth, fifth and sixth defendants.

[110] This court had on the 11 August 2014 prior to delivering judgment, sought clarifications from the plaintiffs, on the remedies sought by the plaintiffs pertaining to the first, second and third defendants, as from the evidence, the first, second and third defendants have been struck off as parties to this action on the 18 January 2010, only the fourth, fifth and sixth defendants remained. The plaintiffs' counsel informed the court that the plaintiffs are not seeking remedies affecting the first, second and third defendants. Arising from the above clarification, this court then accordingly granted an order in terms of the plaintiffs' statement of claim except prayers 2(ii), (iii), (v) and (vii) together with costs.

[111] On 10 September 2014, upon application by the first defendant, this court called for a clarification of its earlier order and having heard submissions from all parties which included the other defendants and upon being appraised of the full background of this case and in particular the earlier decision of YA Dato Rhodzariah Bujang in this case pertaining to the striking out of the first, second and third defendants as parties to this case. After being fully appraised of the material effects on the earlier order made by this court on 11 August 2014, this court would now like to vary the earlier orders made, so that they will be consistent with the said decision of YA Dato Rhodzariah Bujang. Other than the variation of the orders proposed to be made by this court, all other findings of this court remain the same.

[112] The reasons for the variation of the earlier orders made by this court are as follows. YA Dato Rhodzariah Bujang held in various applications filed earlier by the first, second, third, fourth and fifth defendants in this present case which was reported as *Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors* [2010] 10 CLJ 383, held at pp. 386 to 387 as follows:

> It is to be noted, before I go further, that at the time of filing of this action by the Plaintiffs, the leases were provisional leases but subsequently the 2nd Defendant's provisional lease was converted into two leases and described as Lot 266, Block 4 Sedili-Gedong Land District and Lot 1, Block 9 Sedilu-Gedong land District and the provisional lease issued to the 3rd Defendant was similarly converted to a lease described as Lots 164, 162 and 173 of Sedilu-Gedong Land District.

Further at p. 394 of the judgment:

> [21] I had no qualms in agreeing with him, that in view of the provisions he quoted, land titles should not be issued over native customary land, unless they have been extinguished first but with respect, once the titles are issued, I take the contrary stand and the Defendants are right-there is indefeasibility of title …
>
> [22] The same reasoning covers the forest licence of the 1st Defendant for the rights to take forest is incongruous which the right claim by the Plaintiffs to be so entitled to the land. One cannot simply be made subject to the other. Even though there is no like provision in the Forest Ordinance as the Land Code on indefeasibility title, nevertheless, in my view unless the native right claimants can prove fraud and collusion between the Director of Forest and the licensee, the claimants' right of complaints should lie with the issuing authority and not the licensee.
>
> [23] My reasoning above is also premised upon the very principle in which a court action should be based and that is 'actionable wrong'. The Plaintiffs must on the face of the pleadings show that the 1st Defendant here had, through their own acts and/or or omission, caused the deprivation of the Plaintiffs' right to the land. Simply having their name on the forest licence (or lease for that matter) is in my view insufficient to constitute an actionable wrong.
>
> [24] On other words, as issuer of the forest licence and the lease, only the 4th and 5th Defendants, respectively, and the 6th Defendant vicariously must be held accountable should the plaintiffs succeed in proving that they have native customary rights over the land held under the forest licence and leases in this case.

[113] Further in *Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors* [2010] 10 CLJ 383 (*supra*), the court, *inter alia*, held as follows:

> Held
>
> [1] …
>
> [2] …
>
> …

A [4] **Land titles should not be issued over native customary land, unless they have been extinguished first but once the titles are issued, there is indefeasibility of title. (para 21)**

(emphasis added)

B It is pertinent to note that the plaintiffs did not appeal against the said decision of YA Dato Rhodzariah Bujang.

[114] In the light of YA Dato Rhodzariah Bujang's said decision, especially on the issue of indefeasibility of title, this court thus finds that the orders granted by this court is in direct conflict with the orders granted by
C YA Dato Rhodzariah Bujang. Having the benefits of full knowledge of the history of the present case and with a view to ensure that the said orders granted by this court, are in harmony and consistent with the earlier orders granted by YA Dato Rhodzariah Bujang and that third parties' entrenched rights are not infringed or adversely affected, this court thus varies the orders granted this court on 11 August 2014 and the orders are varied as follows:

D

(a) in so far as prayer (vi) of the statement of claim is concerned, since documents of titles in respect of the disputed lands have been issued to the first, second and third defendants to which the doctrine of indefeasibility of titles applies, the order granted earlier for prayer
E (vi) is deleted; and

(b) *in lieu*, this court grants an award of general damages against the fourth, fifth and sixth defendants for loss of the plaintiffs' native customary rights over the disputed lands which have now been alienated to the first, second and third defendants.

F **[115]** In the premises, this court varies the orders granted on 11 August 2014 and now grants prayers (i) and (viii) of the plaintiffs' statement of claim together with cost of RM50,000. In light of an earlier court ruling made in this very suit by YA Dato Rhodzariah Bujang to the effect that since the documents of title to the disputed lands have been issued to the first, second
G and third defendants and that the doctrine of indefeasibility of titles applies, this court thus grants an award of general damages which shall be assessed by the Senior Assistant Registrar against the fourth, fifth and sixth defendants for loss of the plaintiffs' native customary rights over the disputed lands which have now been alienated to the first, second and third defendants.

H **[116]** In light of this variation of this court's decision given on 11 August 2014, time for the purpose of appeal shall commence to run 10 September 2014 and this is without prejudice to any appeal filed by parties earlier.

I